



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RTID 0648-XA721

Endangered Species; File No. 23861

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that NMFS has issued an Incidental Take Permit (ITP) (No. 23861) to Midwest Biodiversity Institute (MBI), pursuant to the Endangered Species Act (ESA) of 1973, as amended, for the incidental take of shortnose sturgeon (*Acipenser brevirostrum*), Gulf of Main Distinct population segment (GOM DPS) Atlantic sturgeon, or the New York Bight (NYB DPS) of Atlantic sturgeon. (*A. oxyrinchus*) and the GOM DPS Atlantic salmon (*Salmo salar*) associated with the otherwise lawful sampling of non-ESA listed fish in the Lower Kennebec River. The permit is issued for a duration of 10 years.

ADDRESSES: The incidental take permit, final environmental assessment, and other related documents are available on the NMFS Office of Protected Resources website at <https://www.fisheries.noaa.gov/action/incidental-take-permit-midwest-biodiversity-institute>.

FOR FURTHER INFORMATION CONTACT: Celeste Stout, phone: (301) 427-8436 or e-mail: celeste.stout@noaa.gov.

SUPPLEMENTARY INFORMATION: Section 9 of the ESA and Federal regulations prohibit the ‘taking’ of a species listed as endangered or threatened. The ESA defines “take” to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited

circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides for authorizing incidental take of listed species. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

Background

NMFS received a permit application from MBI on January 31, 2020. Based on our initial review of the application and conservation plan, we requested further information and clarification. On March 30, 2020, MBI submitted a revised and complete application for the take of ESA-listed shortnose sturgeon, Atlantic sturgeon and Atlantic salmon due to the sampling of non-ESA listed fish in the Lower Kennebec River. MBI proposes to continue an 18 yearlong (2002-19) systematic assessment of the fish assemblages at seven sites in an approximate 17.5 mile (28.2 km) reach of the Lower Kennebec River and three sites in a 6 mile (9.7 km) reach of the Sebasticook River. MBI will conduct boat electrofishing where electric current is generated by a Smith-Root Generator Powered Pulsator and transmitted into the water by an electrode array suspended from the bow of 16-18 foot long (25-29 km) jon boats or a 16 foot long inflatable Wing raft. NMFS determined that the application contained sufficient information for review and consideration under section 10(a)(1)(B) of the ESA. NMFS then provided an opportunity for public review of MBI's application and Conservation Plan. On April 17, 2020, NMFS published a notice of receipt (NOR) of the MBI application in the **Federal Register** (85 FR 21413). The comment period ended on May 18, 2020 and six comments were received. Two of these comments did not pertain to the notice and four were considered relevant. Two of these comments consisted of uploaded letters. The first was from the Maine Council of the Atlantic Salmon Federation and the Maine Council of Trout Unlimited and the second was from The Nature Conservancy in Maine. In these letters these organizations expressed their support of MBI's application

for an ITP. Of the two additional comments one commenter was opposed to the killing of any fish. This is not consistent with the ESA, which allows for the incidental take of listed species if certain criteria are met and a permit is issued by NMFS. Additionally, lethal take is not authorized for this permit. The other commenter seemed confused regarding the requirements of the ESA and the ITP process. NMFS and MBI held further discussions regarding information that would be incorporated in the Conservation Plan and a final application and Conservation Plan was submitted on July 6, 2020.

Conservation Plan

Section 10 of the ESA specifies that no permit may be issued unless an applicant submits an adequate conservation plan. The conservation plan prepared by MBI describes measures designed to minimize and mitigate the impacts of any incidental take of ESA-listed shortnose sturgeon, Atlantic sturgeon and Atlantic salmon. To avoid and minimize take of ESA listed species MBI is required to implement the following minimization measures: a) Conduct sampling between mid-September and mid-October to minimize any encounters with early life stage or juvenile fish. b) MBI will request any recent acoustic detections of ESA listed species in the study area and take steps to avoid any congregations of listed species. c) Only trained and qualified MBI crew leaders and either MBI or Maine Department of Marine Resources (DMR) agency technicians will be allowed to carry out the sampling activities. The MBI crew leader will review the ESA listed species minimization and avoidance procedures with the sampling crew at the beginning of each sampling day. In addition Maine DMR procedures (Bruchs et al. 2016) for electrofishing will be included in the training and instructions. d) Sampling and the operation of the electrofishing gear will be done in a manner that minimizes the potential for injury to the listed species. The pulse frequency will be reduced to 30-60Hz when sampling in areas of prior interaction with ESA listed species to minimize the risk of injury. e) Electric current and sampling activity will cease upon an encounter where a

listed species is observed to be affected by the electric field. Affected sturgeon, if immobilized and/or in apparent distress, may be netted or otherwise handled in order to ascertain any injury and to revive if necessary, but the individual will not be removed from the water. Otherwise, affected fish that leave the electric field under their own power and appear to be uninjured will not be pursued and netted. In such cases, the species identification and estimation of length will be made visually. f) Sampling will not be conducted when ambient water temperature is $>22^{\circ}\text{C}$ per Maine DMR specifications (Bruchs et al. 2016). Temperature will be routinely measured at the start of each electrofishing site, but will be more frequently monitored (every 2 hours) when temperatures are between $20\text{-}22^{\circ}\text{C}$. g) When there is any interaction with a listed species all sampling activities will cease and the electric current will be shut off for a period of 5 minutes and/or until the individual fish are released and determined to have departed the area. Notation will be made about the physical condition of the individual in terms of the reaction to the electric field and if it was able to leave the area under its own power. Photographs will be taken of each interaction to document occurrence and any evidence of injury.

At present, the project is funded by MBI research and development funds, but MBI continues to seek external funding. This project has been ongoing for 18 years and is one of the longest running biological monitoring projects in New England and the only sustained effort that focuses on large river fish assemblages.

Permit 23861

NMFS authorizes the following non-lethal incidental takes:

- Four (adult/subadult) Gulf of Maine & New York Bight DPS Atlantic sturgeon;
- Four (adult/subadult) Shortnose sturgeon; and
- Five (adult/subadult) Gulf of Maine DPS Atlantic salmon.

National Environmental Policy Act

Issuing an ESA section 10(a)(1)(B) permit constitutes a Federal action requiring NMFS to comply with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) as implemented by 40 CFR parts 1500-1508 and NOAA Administrative Order 216-6, Environmental Review Procedures for Implementing the National Policy Act (1999). NMFS has determined that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement. This action falls within the B3 category - Issuance of, and amendments to, “low effect” Incidental Take Permits and their supporting “low effect” Habitat Conservation Plans

under section 10(a)(1)(B) of the ESA. Additionally there are no extraordinary circumstances with the potential for significant environmental effects that would preclude the issuance of this permit type from being categorically excluded.

Dated: December 17, 2020.

Angela Somma,

Chief, Endangered Species Conservation Division,

Office of Protected Resources, National Marine Fisheries Service.

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